

The Honorable Marsha J. Pechman

UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF WASHINGTON
AT SEATTLE

In re Washington Mutual, Inc. Securities,
Derivative & ERISA Litigation

) **No. 2:08-md-01919-MJP**

) **DEFENDANTS' JOINT**
) **RESPONSE TO CERTAIN**
) **PLAINTIFFS' MOTION TO**
) **CONSOLIDATE AND**
) **APPOINT INTERIM CO-LEAD**
) **COUNSEL**

) **Noted for Consideration:**
) **March 28, 2008**

GREGORY BUSHANSKY, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

) **No. C07-01874 (MJP)**

v.

WASHINGTON MUTUAL, INC., et al.,

Defendants.

1 VINCENT BUSSEY, Individually and on Behalf)
 of All Others Similarly Situated,)
 2)
 Plaintiff,) **No. C07-01879 (MJP)**
 3)
 v.)
 4)
 WASHINGTON MUTUAL, INC., et al.,)
 5)
 Defendants.)
 6)

7)
 8 BARBARA ALEXANDER, Individually and on)
 Behalf of All Others Similarly Situated,)
 9)
 Plaintiff,) **No. C07-01906 (MJP)**
 10)
 v.)
 11)
 WASHINGTON MUTUAL, INC., et al.,)
 12)
 Defendants.)
 13)

14 DARLENE MITCHELL, Individually and on)
 Behalf of All Others Similarly Situated,)
 15)
 Plaintiff,) **No. C07-01938 (MJP)**
 16)
 v.)
 17)
 WASHINGTON MUTUAL, INC., et al.,)
 18)
 Defendants.)
 19)

20)
 21 MARINA WARE, Individually and on Behalf of)
 All Others Similarly Situated,)
 22)
 Plaintiff,) **No. C07-01997 (RAJ)**
 23)
 v.)
 24)
 WASHINGTON MUTUAL, INC., et al.,)
 25)
 Defendants.)
 26)

27
 28

LEON ROSENBLATT, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

No. C07-02025 (MJP)

V.

WASHINGTON MUTUAL, INC., et al.,

Defendants.

MATT MCDONALD, Individually and on
Behalf of All Others Similarly Situated,

Plaintiff,

No. C07-2055 (MJP)

V.

WASHINGTON MUTUAL, INC., et al.,

Defendants.

DANA MARRA, Individually and on Behalf of
All Others Similarly Situated,

Plaintiff,

No. C07-2076 (MJP)

V.

WASHINGTON MUTUAL, INC., et al.,

Defendants.

I. INTRODUCTION

Defendants¹ submit this response to the Motion for Consolidation and Appointment of Interim Co-lead Counsel (the “Motion”) filed by Plaintiffs in the above-captioned *Bushansky*, *Bussey*, *Alexander*, *Ware*, *McDonald*, and *Marra* actions on March 13, 2008. Defendants concur in consolidation of the ERISA cases, and further recommend that the consolidated ERISA action

¹For purposes of this response, Washington Mutual, Inc. (“WaMu”), Kerry K. Killinger, Stephen Rotella, James B. Corcoran, Daryl D. David, Anne V. Farrell, Stephen E. Frank, Thomas C. Leppert, Charles M. Lillis, Phillip D. Matthews, Regina T. Montoya, Michael K. Murphy, Margaret Osmer-McQuade, Mary E. Pugh, William G. Reed, Jr., Orin C. Smith, James H. Stever, Thomas Casey are collectively referred to as “Defendants.”

1 be coordinated for pretrial proceedings with a consolidated securities action and a consolidated
 2 derivative action. Defendants take no position on the portion of the Motion seeking appointment
 3 of a particular plaintiff or plaintiffs as “lead” plaintiff and the appointment of a specific law firm
 4 or firms as “lead” counsel. Defendants will work with whichever plaintiff and counsel the Court
 5 appoints in crafting an appropriate schedule for the Court’s consideration.

6 II. PROCEDURAL BACKGROUND

7 The above-captioned putative ERISA class action lawsuits were filed in this Court on
 8 November 20, 2007 (*Bushansky*), November 21, 2007 (*Bussey*), November 29, 2007 (*Alexander*),
 9 December 5, 2007 (*Mitchell*), December 13, 2007 (*Ware*), December 18, 2007 (*Rosenblatt*),
 10 December 21, 2007 (*McDonald*), and December 27, 2007 (*Marra*). In addition to these actions,
 11 certain other plaintiffs have filed putative securities class actions and shareholder derivative
 12 actions. On November 28, 2007, WaMu asked the United States Judicial Panel on Multidistrict
 13 Litigation (the “Panel”) to centralize the various ERISA, securities and derivative litigation in this
 14 Court. The Panel granted WaMu’s motion by order dated February 21, 2008. *See In re*
 15 *Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, 2008 WL 495850,
 16 ____ F. Supp. 2d ____ (J.P.M.L. 2008). Following the Panel’s order centralizing all cases in this
 17 Court, the Clerk of this Court opened a new docket (2:08-md-1919-MJP).

18 On March 13, 2003, the parties in the securities actions filed a Stipulation and Proposed
 19 Order seeking (1) consolidation of the securities cases into a single docket, styled “*In re*
 20 *Washington Mutual, Inc. Securities Litigation*,” (2) appointment of lead plaintiff and lead
 21 plaintiff’s counsel, and (3) an order requiring the filing of a consolidated, amended complaint and
 22 setting out the briefing schedule for defendants’ motion(s) to dismiss [No. 2:08-md-01919-MJP,
 23 Docket #3].

24 The parties to the federal shareholder derivative actions are currently negotiating a
 25 stipulation with similar terms, based in large part on a stipulation and order entered in three related
 26 shareholder derivative actions currently pending in the Superior Court of the State of Washington.
 27 *See Catholic Medical Mission v. Killinger, et al.*, No. 07-2-36548-6 SEA, *Gibb v. Killinger, et al.*,
 28 No. 07-2-41044-9 SEA, and *Breene v. Killinger, et al.*, No. 07-2-41042-2 SEA.

III. ARGUMENT

Defendants support consolidation of each of the ERISA cases identified in the Motion. As the United States Judicial Panel on Multidistrict Litigation ruled when granting WaMu's request to centralize the various securities, derivative and ERISA cases filed against WaMu in this Court and the U.S. District Court for the Southern District of New York, "these actions involve common questions of fact," such that consolidation and/or coordination "will serve the convenience of the parties and witnesses and promote the just and efficient conduct of this litigation." *In re Washington Mutual, Inc. Securities, Derivative & ERISA Litigation*, 2008 WL 495850, at *1, ___ F. Supp. 2d ___ (J.P.M.L. 2008).

Consolidation is "a matter of convenience and economy in administration" that "does not . . . change the rights of the parties." *Johnson v. Manhattan Ry. Co.*, 289 U.S. 479, 496–97 (1933). It "may be ordered where the court in its discretion deems it appropriate and in the interests of justice," *United States v. Washington*, 573 F.2d 1121, 1123 (9th Cir. 1978) (Kennedy, J.), bearing in mind that "considerations of judicial economy strongly favor simultaneous resolution of all claims growing out of one event," *Ikerd v. Lapworth*, 435 F.2d 197, 204 (7th Cir. 1970); *accord Masterson v. Atherton*, 223 F. Supp. 407, 409–10 (D. Conn. 1963) (consolidation "should be granted" where "common questions of law and fact are involved"), *aff'd*, 328 F.2d 106 (2d Cir. 1964).²

Each of the ERISA cases identified in the Motion seeks recovery under the same statute, against essentially the same defendants, based on allegations that are effectively the same. While defendants dispute those allegations vigorously, all parties can agree that "the just, speedy, and inexpensive determination," Fed. R. Civ. P. 1, of the various ERISA cases will best be served by consolidating the suits into one action, allowing whichever plaintiff the Court designates to file

² See also *Johnson v. Miss. Valley Barge Line Co.*, 34 F.R.D. 140, 142 (W.D. Pa. 1963) ("It is fundamental that the law frowns upon multiplicity of litigation, particularly under our Federal Rules of Civil Procedure, and particularly where the court may order the consolidation of all actions involving common questions of law or fact in order to avoid unnecessary costs and delay."); *Weitort v. A. H. Bull & Co.*, 192 F. Supp. 165, 166–67 (E.D. Pa. 1961) ("[T]he purpose of permitting consolidation of actions under the Federal Rules [is] to encourage such consolidation where possible.").

1 one consolidated complaint, and then addressing that complaint as a whole. In addition to
 2 conserving valuable judicial resources, this will avoid the possibility of inconsistent results and the
 3 prejudice that would arise there from.

4 Sixteen cases subject to the Panel's order are now before this Court.³ Consolidation of the
 5 ERISA cases will facilitate the ultimate consolidation of all of the pending matters into three
 6 distinct groups—securities, derivative and ERISA (each with its own docket number and
 7 caption)—that can be coordinated for purposes of pretrial discovery, motion practice and the like.
 8 Further, in the absence of any opportunity for the parties to present the Court with a stipulated
 9 Case Management Order, the “proposed preliminary schedule” suggested in the Proposed Order,
 10 ¶ 6(a), is premature at this time. Defendants will negotiate with whichever plaintiff is designated
 11 by the Court as lead plaintiff concerning the scope and timing of discovery and motion practice.

12 IV. CONCLUSION

13 For the reasons set out above, Defendants agree with the moving plaintiffs that the Court
 14 should consolidate the eight ERISA cases pursuant to Federal Rule of Civil Procedure 42 under
 15 one docket styled “In re Washington Mutual ERISA Litigation.” Defendants, however,
 16 respectfully request the Court strike the “proposed preliminary schedule” suggested in the
 17 Proposed Order, ¶ 6(a) pending the opportunity for defendants to work out a schedule after the
 18 case is consolidated, and the lead plaintiff and its counsel appointed by the Court file an amended
 19 complaint.

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26 ³ WaMu's motion before the Panel originally addressed seven cases. Twelve additional cases
 27 were subsequently filed, and were noted by the Panel as potential “tag-along” actions. *See In re*
 28 *Washington Mutual, Inc.*, 2008 WL 495850, at*1 n.1. All but three of those actions are now
 before the Court.

1 Dated this 24th day of March 2008.

2
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